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Employment Discrimination: Recent Developments in the Supreme Court (Symposium: The Supreme Court and Local Government Law, 1993-1994 Term)

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EMPLOYMENT DISCRIMINATION: RECENT DEVELOPMENTS IN THE SUPREME COURT

Hon. Leon D. Lazer:

Our next speaker is going to deal with a question of discrimination. I think most of us know that Professor Kaufman is one of the most prominent members of the Touro faculty, an author on constitutional law, and a very important member of a committee that draws up model jury charges for all of the judges in the state. She rewrote the defamation section of those pattern jury charges. She has been creating, within that book of jury charges, a whole series of charges and comments dealing with discrimination, so she is a very apt person to deal with the discrimination cases and some other matters of interest to us. There was one case dealing with sexual harassment. It is my pleasure to introduce Professor Eileen Kaufman.

Professor Eileen Kaufman:*

INTRODUCTION

I am grateful that the topic assigned to me today is employment discrimination, particularly sexual harassment, because hopefully the topic is sufficiently interesting and controversial that I will be able to keep your attention despite the lateness of the hour.

Let me begin by describing what I will not be covering, in the interest of time. One of the cases that is included in the booklet is *National Organization for Women v. Scheidler*,¹ which is a RICO

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1. 114 S. Ct. 798 (1994).

case,² not an employment discrimination case. *Scheidler* raises the issue of whether RICO imposes an economic motive requirement.³ This was the case involving the application of RICO to protesters at abortion clinics. The only issue decided by the Court was that RICO does not impose an economic motive requirement.⁴ Left unaddressed and unresolved are the interesting First Amendment issues.⁵ You may remember that this morning Professor Margulies referred to Justice Souter as the "stealth" First Amendment Justice.⁶ That characterization is borne out in this RICO case because Justice Souter wrote a concurring opinion to emphasize that the decision in this case does not bar any subsequent First Amendment challenges to the application of RICO to abortion protesters.⁷ He ends his opinion by noting, "I think it prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake."⁸ We should therefore be on the lookout for First Amendment challenges. We already have seen quite a number of them, not only under RICO, but under a statute that was adopted last spring, entitled FACE, The Freedom of Access to Clinic Entrances Act of 1994.⁹ To my knowledge, the courts have uniformly rejected First Amendment challenges to the statute.¹⁰

2. A RICO case involves a claim alleging that the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1984), has been violated.

3. *Scheidler*, 114 S. Ct. at 803.

4. *Id.* at 806.

5. *Id.* at 806 n.6 (explaining that the First Amendment issues were not preserved for review).

6. Martin B. Margulies, *Free Speech: The Status of the First Amendment*, 11 TOURO L. REV. 341, 356 (1995).

7. *Scheidler*, 114 S. Ct. at 806 (Souter, J., concurring).

8. *Id.* at 807 (Souter, J., concurring).

9. 18 U.S.C. § 248 (1994).

10. See *U.S. v. Brock*, 863 F. Supp. 851, 870 (E.D. Wis. 1994) (holding that FACE is not unconstitutional); *Riely v. Reno*, 860 F. Supp. 693, 709 (D. Ariz. 1994) (holding that FACE does not violate the First, Fourth, Fifth, Eighth, or Tenth Amendments); *Cook v. Reno*, 859 F. Supp. 1008, 1101 (W.D. La. 1994) (holding that FACE is a valid exercise of legislative power); *Council for Life Coalition v. Reno*, 856 F. Supp. 1422, 1431-32 (S.D. Cal. 1994) (holding that FACE does not "infringe plaintiffs' rights under the First and Fifth

Let me now outline what I do plan to cover this afternoon and that is the employment discrimination cases of last Term: one dealing with sexual harassment¹¹ and a pair of cases raising the issue of the retroactivity of the 1991 Civil Rights Act.¹² Time permitting, I will also talk a little about the major employment discrimination case before the Court this year.¹³

At the outset, we probably can agree that, starting with the Clarence Thomas/Anita Hill hearings, there has certainly been renewed attention paid to employment discrimination statutes and particularly to the problem of sexual harassment in the workplace. According to one recent survey, companies have reported a doubling of complaints of sexual harassment between the years 1991 and 1993.¹⁴

There are two types of sexual harassment. One is *quid pro quo* harassment and the other is termed hostile work environment. These two theories and terms were originally developed and coined by Catharine MacKinnon,¹⁵ and subsequently explicitly adopted by the United States Supreme Court.¹⁶ The two theories are quite distinct.¹⁷ A *quid pro quo* claim arises where there has been a

Amendments, or their putative statutory rights under the Religious Freedom Restoration Act, and Congress had full authority to enact FACE under the Commerce Clause"); *American Life League, Inc. v. Reno*, 855 F. Supp. 137 (E.D. Va. 1994) (upholding the constitutionality of FACE).

11. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

12. *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483 (1994); *Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510 (1994).

13. *McKennon v. Nashville Banner Publishing Co.*, 9 F.3d 539 (6th Cir. 1993), *rev'd and remanded*, No. 93-1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995).

14. *More Sexual Harassment Complaints*, 1 N.Y. EMPLOYMENT L. REP. 2 (1994).

15. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

16. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

17. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 783 (1st Cir. 1990) (holding that it could not be accepted that the "severity or pervasiveness" element essential to an actionable hostile environment discrimination claim is met merely with evidence sufficient to establish *quid pro quo* harassment"); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (stating that the sexual harassment only consisted of hostile work environment because the defendant did not "demand sexual favors as a *quid pro quo* for job

demand for sexual favors in exchange for some employment benefit. In the language of the EEOC guidelines, *quid pro quo* harassment occurs when "submission to or rejection of" unwelcomed sexual "conduct by an individual is used as the basis for employment decisions affecting such individual."¹⁸ Hostile work environment claims arise where there has been a "sufficiently severe or pervasive [hostile environment] 'to alter the conditions of [the victim's] employment [thereby] creat[ing] an abusive working environment.'"¹⁹

I. HARRIS V. FORKLIFT SYSTEMS

There are two recent decisions that are very instructive regarding how to analyze sexual harassment cases.²⁰ It seems to me that the common denominator emerging from these cases is that when analyzing sexual harassment claims, the focus should be on the employer's conduct rather than on the employee's reaction.

The first case is *Harris v. Forklift Systems*.²¹ This was only the second sexual harassment case to reach the United States Supreme Court.²² Harris worked as a manager for Forklift Systems.²³ Throughout her time there, her employer, the company president, "often insulted her because of her gender and often made her the target of unwanted sexual innuendoes."²⁴ Several times in the presence of other employees, he said, "You're a woman, what do

benefits"); *Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 649 (6th Cir. 1986) (noting that "unlike *quid pro quo* sexual harassment claims which may be predicated upon a single incident of sexual harassment, hostile environment claims are characterized by varied combinations and frequencies of hostile sexual exposures" (citing *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986))).

18. 29 C.F.R. § 1604.11(a)(2) (1994).

19. *Meritor*, 477 U.S. at 67 (citation omitted).

20. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993); *Karibian v. Columbia Univ.*, 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994).

21. 114 S. Ct. 367 (1993).

22. The first sexual harassment case to reach the United States Supreme Court was *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

23. *Harris*, 114 S. Ct. at 369.

24. *Id.*

you know?" and "We need a man as the rental manager."²⁵ At least once he called her "a dumb ass woman."²⁶ Again, in front of others, he suggested that the two of them go to some nearby motel in order to negotiate her raise.²⁷ He occasionally asked the plaintiff and some "other female employees to get coins from his front pants pocket" and often he would throw objects on the ground and then ask the female employees to bend down to pick them up.²⁸ He also made sexual innuendoes about her clothing.²⁹ Finally, when she was arranging a deal with one of the company's customers, he asked her, in the presence of other employees, "What did you do, promise the guy. . . some sex Saturday night?"³⁰ Those were the facts before the Court in *Harris*.

The *Harris* decision is very important for at least two reasons. Firstly, the Court explicitly reaffirmed its holding in *Meritor Savings Bank v. Vinson*,³¹ that sexual harassment constituting unlawful employment discrimination is not limited to tangible economic discrimination but also includes requiring people to work in a discriminatory hostile or abusive environment.³² In the Court's words, "[w]hen the work place is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated."³³ Secondly, and more specifically, the case is important because it establishes that a plaintiff alleging a hostile work environment need not prove psychological injury.³⁴ In *Harris*, the employer argued that plaintiff had failed to demonstrate psychological injury and that therefore, her case should be

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 477 U.S. 57 (1986).

32. *Id.* at 66. The Court agreed with the EEOC guidelines that a Title VII violation may be established by "proving that discrimination based on sex has created a hostile or abusive work environment." *Id.*

33. *Harris*, 114 S. Ct. at 370 (citing *Meritor*, 477 U.S. at 65, 67).

34. *Id.* at 370-71.

dismissed.³⁵ The Court rejected that argument and instead announced the following standard:³⁶ “So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.”³⁷ I trust that you can hear the objective and subjective elements of that test; objective in that the hostile work environment must be one that would reasonably be perceived as such, but subjective in that the employee must herself perceive it to be so. The Court concedes that this is hardly a “mathematically precise” test,³⁸ a point also noted in Justice Scalia’s concurrence where he compares it to the standard for negligence which we have managed to live with for quite some time.³⁹

In order to determine whether an environment is hostile for purposes of Title VII, we look at the totality of circumstances, including the frequency of the discriminatory conduct, its severity, “whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance,” and finally, whether the employee’s psychological well-being is affected.⁴⁰ The *Harris* Court cautions that no one factor is required. Rather, these are factors that should be taken into account in determining overall whether the environment is sufficiently hostile so as to be actionable.⁴¹

It seems to me that this decision underscores the point that I made earlier, that the focus of the inquiry in a sexual harassment case should be on the defendant’s conduct rather than on the employee’s reaction. As the *Harris* Court noted, “Title VII comes into play before the harassing conduct leads to a nervous breakdown.”⁴² Further, the Court explained that a hostile work environment, even one that does not produce psychological injury,

35. *Id.* at 371.

36. *Id.* at 370.

37. *Id.* at 371.

38. *Id.*

39. *Id.* at 372 (Scalia, J., concurring).

40. *Id.* at 371.

41. *Id.*

42. *Id.* at 370.

usually has other effects.⁴³ It often affects job performance, it might prevent advancement in the job, it might “discourage employees from remaining on the job,” and needless to say, it “offends Title VII’s broad rule of workplace equality.”⁴⁴ Therefore, the mere fact that the employee did not suffer psychological injury does not defeat the claim.

II. KARIBIAN V. COLUMBIA UNIVERSITY

The other sexual harassment case which is quite instructive, *Karibian v. Columbia University*,⁴⁵ was decided by the Second Circuit in 1994. This decision contains two very important holdings, one dealing with *quid pro quo* claims and the other dealing with employer liability for hostile work environment claims. In *Karibian*, the employee gave in to her supervisor’s demand for sexual favors and thus received the promised economic benefits.⁴⁶ For that reason, her claim was dismissed by the district court because she could not prove any economic loss.⁴⁷ The Second Circuit reversed, noting the obvious, that in the nature of things, “evidence of economic harm will never be available to support the claim of an employee who *submits* to the supervisor’s demands.”⁴⁸ However, the absence of economic harm does not render the conduct of the supervisor any less unlawful.⁴⁹ The Second Circuit noted that “[u]nder the district court’s rationale only the employee who successfully resisted the threat of sexual blackmail could state a *quid pro quo* claim.”⁵⁰ The court further stated that, “[s]uch a rule would only encourage harassers to increase their persistence.”⁵¹ Under the Second Circuit’s decision, the relevant inquiry in a *quid pro quo* case is not whether the

43. *Id.* at 370-71.

44. *Id.* at 371.

45. 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994).

46. *Id.* at 776.

47. *Id.*

48. *Id.* at 778.

49. *Id.*

50. *Id.*

51. *Id.*

employee suffered economic loss, but rather, whether the supervisor “linked tangible job benefits to the acceptance or rejection of sexual advances.”⁵² It is sufficient “to show that the supervisor used the employee’s acceptance or rejection of his advances as the basis for a decision affecting the compensation, terms, conditions, or privileges of the employee’s job.”⁵³ In *Karibian*, as in *Harris*, the explicit focus of the court’s analysis is on the prohibited conduct, not on the victim’s reaction.

The second issue decided in *Karibian* has to do with employer liability for a hostile work environment.⁵⁴ By way of background, it is clear that employers are vicariously or strictly liable for *quid pro quo* harassment.⁵⁵ This rule reflects the fact that the harasser, by definition, is wielding the employer’s authority “to alter the terms and conditions of employment.”⁵⁶ However, the question of employer liability in hostile work environment cases has not been decided by the Supreme Court.⁵⁷ In *Meritor Savings Bank v. Vinson*,⁵⁸ the Court left the question open but indicated that

52. *Id.*

53. *Id.*

54. *Id.* at 779.

55. *Id.* (stating that “liability for *quid pro quo* harassment is always imputed to the employee . . .”). See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72 (1986) (noting that agency principles would provide sound guidance in sexual harassment cases); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 185-86 (6th Cir. 1992) (holding that “[u]nder a *quid pro quo* theory of sexual harassment, an employee is held strictly liable for the conduct of its supervisory employees . . . under a theory of respondeat superior”); *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) (holding that “in a *quid pro quo* sexual harassment case the employer is held strictly liable for its employee’s unlawful acts”); *Steele v. Off Shore Shipbuilding Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) (holding that “the corporate defendant is strictly liable for the supervisor’s harassment”); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 785 (1st Cir. 1970) (reiterating that “an employer is strictly liable for the actions of its supervisors that amount to sexual discrimination or sexual harassment resulting in tangible job detriment to the subordinate employee” (quoting *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982))).

56. *Karibian*, 14 F.3d at 777.

57. *Meritor*, 477 U.S. at 70-72 (declining to establish “a definite rule on employer liability . . .”).

58. 477 U.S. 57 (1986).

employers are not automatically strictly liable for hostile work environment created by their employees but on the other hand, are not automatically insulated from liability by either a lack of notice to the employer or the existence of complaint procedures.⁵⁹ In *Karibian*, the Second Circuit struck something of a middle ground between those two extremes. The Second Circuit held that an employer is liable for a hostile work environment "created by a supervisor if the supervisor used his actual or apparent authority to further the harassment or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship."⁶⁰ When, however, the hostile environment is created by a fellow employee or by a low-level supervisor who is not using any actual or apparent authority to carry out the harassment, then the employer will not be liable for the hostile work environment unless the employer either provided no reasonable means for grievance or complaints or if the employer was aware of the harassment and did nothing about it.⁶¹

Three days after the Supreme Court denied certiorari in *Karibian*, the Third Circuit rendered a decision that seems to take a slightly different approach on the issue of employer liability in a hostile work environment case.⁶² I think it is only a matter of time until the Supreme Court resolves the question of employer liability for hostile work environments created by supervisors.

III. LANDGRAF V. USI FILM PRODUCTS & RIVERS V. ROADWAY EXPRESS, INC.

The other major employment discrimination cases decided last year have to do with the 1991 Civil Rights Act,⁶³ the Act that

59. *Id.* at 72.

60. *Karibian*, 14 F.3d at 780.

61. *Id.*

62. *Spain v. Gallegos*, 26 F.3d 439, 450-51 (3d Cir. 1994) (stating that "if a plaintiff proves that management-level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer will be liable" (citing *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983))).

63. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

changed many aspects of Title VII and other employment discrimination statutes. The issue resolved in *Landgraf v. USI Film Products*⁶⁴ and *Rivers v. Roadway Express, Inc.*,⁶⁵ is whether the Act is retroactive, that is whether it applies to cases pending when the Act was enacted. I am sure you recall the somewhat tortured history leading up to the passage of the Civil Rights Act of 1991.⁶⁶ Basically, this Act was proposed and ultimately enacted to legislatively overrule a series of Supreme Court decisions announced in 1989, most notably *Wards Cove v. Atonio*⁶⁷ and *Patterson v. McLean Credit Union*,⁶⁸ that dramatically restricted the scope of Title VII and other employment discrimination statutes. We have talked about those cases in greater detail in previous symposia.⁶⁹ Congress attempted to legislatively overrule those decisions and others by proposing the Civil Rights Act. You probably remember that President Bush vetoed this Act in 1990.⁷⁰ That version of the bill did provide for its retroactivity. The next year, through a series of compromises, the bill was passed and signed into law.⁷¹ This revision, however, contained no reference

64. 114 S. Ct. 1483 (1994).

65. 114 S. Ct. 1510 (1994).

66. See Cailin Brown, *Women's Work Issues on Agenda at Meeting*, TIMES UNION, April 25, 1991, at C8 (quoting Cathy Collette, director of the women's rights department for the American Federation of State, County, and Municipal Employees that the 1991 Civil Rights Act "is being opposed by business with the mistaken belief that it will be disruptive"); Al Kamen, *Bill Opens Up Second Front of Civil Rights Act*, TIMES UNION, November 24, 1991, at B6 (stating that Presidents Bush's signing of the 1991 Civil Rights Act comes after a "bitter, two-year war over civil rights"); Andrew Rosenthal, *Bush Signs Rights Bill Amid Furor Over Stance*, TIMES UNION, November 22, 1991, at A1 (explaining that President Bush hoped "to end a bruising two-year fight over job discrimination" by signing the 1991 Civil Rights Act).

67. 490 U.S. 642 (1989).

68. 491 U.S. 164 (1989).

69. See George C. Pratt, Martin A. Schwartz, Leon Friedman, *Section 1983*, 6 TOURO L. REV. 5 (1989); Charles Stephen Ralston, Paul D. Kamenar, William Bradford Reynolds, Gail Wright-Sirmans, *Employment Discrimination*, 6 TOURO L. REV. 55 (1989).

70. Brown, *supra* note 66, at C8 (noting that President Bush vetoed the proposed Civil Rights Act in 1990).

71. See *Bush Undermines Compromise With Civil Rights Retreat Playing Both Sides, He Disgraces His Own Effort*, BUFFALO NEWS, November 23, 1991,

to the question of retroactivity except with respect to a few provisions. It seems clear that the failure to include a provision regarding retroactivity was not an oversight, but rather reflects Congress' inability to reach a compromise on this issue. Thus, the question before the Court last Term in *Landgraf* and *Rivers* was what tenet of construction should be used to decide whether or not the statute is to be applied retroactively, in the absence of any clear legislative statement. The Court had two seemingly inconsistent tenets of construction available. One was that a court is to apply the law in effect at the time it renders its decision,⁷² but the second is that retroactivity is not favored in the law and therefore, statutes will not be construed to have retroactive effect unless their language requires that result.⁷³ Justice Stevens, writing for the majority, came down squarely in favor of the presumption against retroactivity.⁷⁴ He concluded that, absent clear congressional intent to the contrary, a statute should not be given retroactive effect if the statute works to "impair rights a party possessed when he

at C2 (explaining that while President Bush signed the 1991 Civil Rights Act with one hand he used his other hand "to snatch away the foundation for two decades of efforts to get women and minorities into the mainstream job market"); Kamen, *supra* note 66, at B6 (stating that President Bush signed the 1991 Civil Rights Act and by doing so began a new dispute over the Act that will include "armies of regulators and lobbyists, lawyers and bureaucrats"); Stephanie Saul, *The Directive in Dispute*, *NEWSDAY*, November 22, 1991, at 5 (stating that civil rights activists claimed President Bush repudiated a critical section of the 1991 Civil Rights Act as he signed it).

72. See *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 711 (1973) ("We anchor our holding. . . on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or statutory direction or legislative history to the contrary."); see also *United States v. Schooner Peggy*, 1 Cranch 103 (1801) ("In such a case the court must decide according to existing laws, and if necessary to set aside a judgement, rightful when rendered. . .").

73. See *Murray v. Gibson*, 15 How. 421, 423 (1854) (stating "that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication").

74. See *Landgraf v. USI Film Prod.*, 114 S. Ct. 1483 (1994). Writing for the majority, Justice Stevens stated: "The presumption against statutory retroactivity is founded upon sound considerations of policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation. We are satisfied it applies to § 102." *Id.* at 1508.

acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed."⁷⁵ If the statute does any one of those things, absent a clear congressional intent to have it apply retroactively, it will not be so interpreted or applied.⁷⁶

In applying that standard to the two cases before it, the Court concluded that the provisions at issue were not to be applied to pending cases.⁷⁷ Thus, the holding in *Landgraf* means that the new compensatory and punitive damage promises of Title VII as well as the availability of a jury trial do not apply retroactively. Similarly, in *Rivers*, the provision extending section 1981 beyond initial contract formation was not applied to pending cases.⁷⁸ In *Patterson v. McLean Credit Union*,⁷⁹ the Court had held that section 1981 does not apply to anything that happens after someone is initially hired.⁸⁰ The Civil Rights Act of 1991 legislatively overruled *Patterson* by providing that section 1981 is not limited to initial contract formation but covers the post-contract formation employment relation as well. In *Rivers*, the Court determined that this provision was not to be applied retroactively.⁸¹ Justice Blackmun was the sole dissenter in these two cases. His dissent concludes with the observation that there is "nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost thirty years."⁸² These two decisions end three years of intense litigation over the retroactivity issue involving plaintiffs attempting to benefit from the new remedies available under the 1991 Civil Rights Act.⁸³

75. *Id.* at 1505.

76. *Id.*

77. *Id.* at 1508. *See Rivers v. Roadway Express Inc.*, 114 S. Ct. 1510, 1519-20 (1994).

78. 114 S. Ct. 1510 (1994).

79. 491 U.S. 164 (1989).

80. *Id.* at 178-79.

81. *See Rivers*, 114 S. Ct. at 1519-20.

82. *Landgraf*, 114 S. Ct. at 1510 (Blackmun, J., dissenting); *Rivers*, 114 S. Ct. at 1520-23 (Blackmun, J., dissenting).

83. *See Brown*, *supra* note 66, at C8 (noting that the lobbyists behind the 1991 Civil Rights Act intended to "reverse recent court rulings narrowing the

IV. MCKENNON V. NASHVILLE BANNER PUBLISHING CO.

I would like to call your attention to the major employment discrimination case before the Court this Term. I think it is an interesting one. The case is *McKennon v. Nashville Banner Publishing Co.*⁸⁴ Because the case may be treated as a mixed-motives case, let me provide some background about how the courts typically resolve employment discrimination claims based on mixed motives. In a mixed-motive case, there is a legitimate reason standing alongside an illegitimate or unlawful reason. In such a case, the plaintiff must establish that the discriminatory reason was a motivating factor in the employer's decision.⁸⁵ The burden of proof then shifts to the employer to establish that it would have made the same decision anyway.⁸⁶ Some of you may be familiar with the *Mount Healthy* standard.⁸⁷ In the context of Title VII, the standard that I just described is derived from a Supreme Court case entitled *Price Waterhouse v. Hopkins*.⁸⁸ The Civil Rights Act of 1991 addressed the issue of mixed motive by explicitly incorporating the motivating factor standard that I just described.⁸⁹ However, the Act alters the remedial scheme quite

remedies available in discrimination cases and putting the burden of proof on the victim").

84. 9 F.3d 539 (6th Cir. 1993), *rev'd and remanded*, No. 93-1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995).

85. *See* 42 U.S.C. § 2000e-2(m) (1994). This section states: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor. . . even though other factors motivated the practice." *Id.*

86. *See* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (holding that when a plaintiff establishes that "her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account").

87. *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977).

88. 490 U.S. 228 (1989).

89. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

substantially.⁹⁰ Pursuant to the Act, if a plaintiff demonstrates that the discriminatory reason was a motivating factor for the adverse employment decision, liability is established under Title VII, even if the employer meets the burden of showing that it would have made the same decision because of some other legitimate reason.⁹¹ Liability is established as soon as plaintiff shows that discrimination was a motivating factor. However, that would just entitle plaintiff to injunctive and declaratory relief, not to damages, nor to an order directing hiring or promotion or reinstatement.⁹² Those other remedies would only be available if the employer is unable to meet the burden of demonstrating that it would have made the same decision anyway. That is the alteration of the remedial scheme effectuated by the Civil Rights Act of 1991. There is a very useful decision authored by Judge Pratt entitled *Tyler v. Bethlehem Steel Corp.*,⁹³ which goes a long way toward helping to make clear what is otherwise an enormously complex area of the law, and I heartily commend this decision to you. It is particularly useful for New York lawyers because it analyzes the issue under the New York Human Rights Law.⁹⁴

This background is relevant to the case before the Court this year because, in a sense it is a type of mixed-motive case. *McKennon v. Nashville Banner Publishing*⁹⁵ raises the issue of the role of after-acquired evidence in employment discrimination cases. The scenario goes something like this. The employee is discharged. The employee alleges that the discharge was based upon a discriminatory reason, such as race or gender. While the case is pending, typically during discovery, the employer learns of

90. 42 U.S.C. § 2000e (1964), as amended by Act of Nov. 21, 1991, Pub. L. No. 102-166, § 5(g)(B)(i) (stating that a court "may grant declaratory relief, injunctive relief (except as provided by Clause ii) and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title").

91. *Id.*

92. *Id.*

93. 958 F.2d 1176 (2d Cir.), cert. denied, 113 S. Ct. 82 (1992).

94. *Id.* at 1180 (explaining that the "action was commenced as a diversity action under New York's Human Rights Law").

95. 9 F.3d 539 (6th Cir. 1993), rev'd and remanded, No. 93-1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995).

misconduct that would have warranted the discharge of the employee had the employer known. What is the relevance of that after-acquired evidence? Does it serve to bar a plaintiff's claim? Does it affect plaintiff's damages? Those are the questions that are posed by *McKennon*.

Christine McKennon worked for the defendant for thirty-nine years until she was fired in 1990 when she was sixty-two years old.⁹⁶ She sued the company claiming that her firing was because of her age.⁹⁷ Fourteen months later, while she was testifying at a deposition, she mentioned that shortly before her discharge, she had copied confidential documents of the employer because she suspected that she was about to be fired and she wanted some "insurance" or "protection."⁹⁸ Two days after that deposition, the employer sent her a letter terminating her employment, or reterminating her employment, based on the breach of her employment responsibilities.⁹⁹ Apparently, there is no dispute that had the employer found out about the copying of confidential papers at the time, she would have been fired.¹⁰⁰ Both the district court and the Sixth Circuit held that this after-acquired evidence, coupled with the employer's assertion that it would have fired her had it known about this conduct, barred any recovery.¹⁰¹ Plaintiff's brief to the Supreme Court argues that after-acquired evidence should not be used to shield what is otherwise clearly unlawful discriminatory acts.¹⁰² She further argues that an employer should have to prove not only that it would have dismissed the employee had it known, but also that it would have discovered the information even in the absence of the discrimination litigation.¹⁰³ According to McKennon's brief to the Supreme Court, if the employer can prove that the misconduct

96. *Id.* at 540.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 541, 543.

102. Brief for Petitioner at pointhead III, *McKennon v. Banner Nashville Publishing Co.*, No. 93-1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995) (No. 93-1543).

103. *Id.*

would have warranted and resulted in firing and also that the employer would have discovered the misconduct absent the litigation, then the evidence can be used to prevent reinstatement¹⁰⁴ but it cannot prevent liability.¹⁰⁵

This issue has arisen in a number of circuits with most agreeing with the Sixth Circuit's analysis.¹⁰⁶ Some of the decisions use mixed-motive type analysis concluding that the claim is barred.¹⁰⁷ Other courts have refused to allow the evidence in to bar the claim and instead have said it is relevant just on the issue of damages.¹⁰⁸ Let me call your attention to two of the leading cases. A case that is illustrative of those circuits that conclude that after-acquired evidence should bar the claim is a Tenth Circuit case called *Summers v. State Farm Mutual Automobile Insurance Co.*¹⁰⁹ The Tenth Circuit bolsters its conclusion by analogizing to a situation involving a masquerading doctor.¹¹⁰ If someone who is not really a doctor, masquerades as a doctor, and then is discharged, would it make sense to afford this masquerading doctor any remedies? Not according to the Tenth Circuit. This approach has also been used by the Eighth, Sixth, and usually the Seventh Circuit.¹¹¹ The Third

104. *Id.* at p. 104. III, IV.

105. *Id.*

106. *Welch v. Liberty Mach. Works, Inc.* 23 F.3d 1403, 1405 (8th Cir. 1994) (stating that the after-acquired evidence of employee misrepresentation bars recovery for an unlawful discharge, if the employer establishes that they would not have hired the employee had it known of the misrepresentation); *Redd v. Fisher Controls*, 814 F. Supp. 547, 553 (1992), *aff'd*, 35 F.3d 561 (5th Cir. 1994) (holding that the plaintiff was not entitled to any relief due to defendant's uncontroverted evidence that had he known of her application falsification and prior theft conviction, he would have fired her).

107. *See infra* notes 109-11 and accompanying text.

108. *Smith v. General Scanning, Inc.*, 876 F.2d 1315, 1319 (7th Cir. 1989) (holding that employee's resume fraud was relevant only to determine if he was eligible for back pay); *Moodie v. Federal Reserve Bank of N.Y.*, 831 F. Supp. 333, 336 (S.D.N.Y. 1993) (holding that using after-acquired evidence to decide damages if a violation by the employer is found is the correct approach).

109. 864 F.2d 700 (10th Cir. 1988) (using *Mount Healthy* to decide that after-acquired evidence should bar discriminatory discharge claim).

110. *Id.* at 708.

111. *See Welch v. Liberty Mach. Works Inc.*, 23 F.3d 1403, 1405 (8th Cir. 1994) (finding that "the *Summers* rule is the better rule"); *Milligan-Jensen v. Michigan Technological Univ.*, 975 F.2d 302, 304 (6th Cir. 1992) (agreeing

and the Eleventh Circuits reject that approach.¹¹² There is a recent decision from the Third Circuit, *Mardell v. Harleysville Life Insurance Co.*,¹¹³ that is a very useful decision, because it also reads like a primer on employment discrimination law. It explains all the theories and provides all of the citations, in the nature of a law review article.

One last and I think interesting side note arises in response to those decisions that have said that after-acquired evidence can be used to bar the claim. Apparently employers are utilizing new and very aggressive techniques designed not only to acquire this evidence during litigation but also to create some opportunities in advance for creating evidence of misconduct which can be used after a discharge to bar a discrimination claim. There is literature now appearing that gives advice to employers, with one article urging employers to maximize the probability that after-acquired evidence is available as a defense by revising employment applications to elicit more specific information.¹¹⁴ I think we

with the reasoning of the *Summers* rule and reaffirming the adoption of the *Summers* rule); *Washington v. Lake County, Ill.*, 969 F.2d 250, 253 (7th Cir. 1992) (stating that “[a]lthough this Court has never squarely adopted the *Summers* rationale,” two cases decided by the *Washington* court had cited *Summers*).

112. *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1222 (3d Cir. 1994) (rejecting the *Summers* rule); *Wallace v. Dunn Constr. Co., Inc.*, 968 F.2d 1174, 1181 (11th Cir. 1992) (rejecting the *Summers* rule that “after-acquired evidence may effectively provide an affirmative defense to Title VII liability”).

113. 31 F.3d 1221 (3d Cir. 1994).

114. See James A. Burstein & Steven L. Hamann, *Better Late Than Never — After-Acquired Evidence in Employment Discrimination Cases*, 19 EMPLOYEE REL. L.J. 193, 202-03 (1993) (“[A]fter-acquired evidence should be factored in crafting personnel policies . . . to ensure that applications and employee manuals expressly state that resume fraud or application misrepresentations will result in suspension pending discharge” and that “a prompt and thorough investigation of a complainant’s discrimination charge should be conducted.”); David D. Kadue & William J. Dristas, *The Use of After-Acquired Evidence in Employee Misconduct and Resume Fraud Cases*, 44 LAB. L.J. 531 (1993) (discussing how employers may successfully defend lawsuits for breach of employment contract and for employment discrimination by utilizing various theories put forth in decisions relying on after-acquired evidence); George D. Mesritz, “*After-Acquired*” Evidence of Pre-Employment Representations: An Effective Defense Against Wrongful Discharge Claims, 18 EMPLOYEE REL. L.J. 215, 222 (1992)

should pay close attention to how the Supreme Court decides the *McKennon* case; a) because I think it is a significant issue; and b) because it might prove instructive on how mixed-motive cases in general should be handled.¹¹⁵ Thank you very much for your attention this late in the day.

("Not every misrepresentation will be caught during pre-employment background checks, so applications should be revised to maximize the availability of the 'after-acquired' evidence defense.").

115. Professor Kaufman's speech was given on October 14, 1994. On January 23, 1995 the Supreme Court reversed and remanded *McKennon*, No. 93-1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995). In a unanimous opinion, the Court held that after-acquired evidence does not bar the employment discrimination suit nor preclude all relief. *Id.* at *2, 3. The Court stated that "[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and the compensation objectives of the ADEA." *Id.* The Court recognized that "if after-acquired evidence of wrongdoing that would have resulted in termination, operated, in every instance to bar all relief for an earlier violation of the Act" then the deterrence objective of the ADEA would not be enforced, as violations would go unchecked and unenforced. *Id.* at *13, 14.

The Court, in its analysis, compared after-acquired evidence cases with mixed-motive cases and decided that "mixed motives cases are inapposite here, except to the important extent they underscore the necessity of determining the employers motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination law." *Id.* at *15. The Court noted that an employer in an after-acquired evidence case "could not have been motivated by knowledge it did not have and it cannot now claim that the employee was fired for the non discriminatory reason." *Id.*

In considering what remedies are available to a plaintiff in an after-acquired evidence case, the Court stated that the question of "[t]he proper boundaries of remedial relief . . . must be addressed by the judicial system in the ordinary course of further decisions, for the factual permutations and the equitable considerations they raise will vary from case to case." *Id.* at *18. However, the Court did conclude that "as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy." *Id.* The Court noted that it would be unfair and pointless to reinstate an employee who would have been, and will be, terminated upon lawful grounds. *Id.* at *18, 19.

With respect to backpay, the Court stated that "[t]he beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered." *Id.* at *19, 20. The Court explained that "extraordinary equitable circumstances that affect the legitimate interests of either party" should be taken into account when determining the appropriate relief available. *Id.* at *20.

The Court further stated that after-acquired evidence of wrongdoing must be “of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” *Id.* Wary of the fact that employers may “as a routine matter undertake extensive discovery into an employee’s background or performance on the job to resist claims under the Act,” the Court stated that employers will be deterred from such abuses by the ability of the courts to award attorney’s fees under 29 U.S.C. §§ 216(b), 626(b) and sanctions under Rule 11 of the Federal Rules of Civil Procedure. *Id.* at *20, 21.

